92-561

No.

Supreme Court, U.S.
FILED
JUL 7 2 1992
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1991

S&M CONSTRUCTORS, INC.,
Petitioner,

v.

THE FOLEY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petition For Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

I. Whether a subcontractor under a government contract between the United States and the general contractor may be compelled to arbitrate claims arising out of delays caused by the United States Government where the Disputes Clause of the prime contract and the terms of the Contract Disputes Act of 1978 were specifically incorporated into the subcontract and which issues in arbitration, of necessity, involve and sound against the United States Government who cannot be a party to such arbitration.

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Parent or Subsidiary Companies

There is no parent or subsidiary company to be listed.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Eighth Circuit, reported at 959 F.2d 97 (8th Cir. 1992), is reprinted as Appendix A. It affirms the opinion of the United States District Court for the Western District of Missouri, Western Division, Case No. 92-0142-CV-W-6, unreported, which is reprinted as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was made and entered on March 16, 1992. This Petition is within ninety days of that date. The jurisdiction of this Court to review the judgment on petition for certiorari rests on 28 U.S.C. §1254(1).

STATUTES IN ISSUE

The statutory provisions at issue are Sections 3, 6 and 7 of the Contract Disputes Act of 1978, 41 U.S.C. §§602, 605 and 606 and Sections 2, 3 and 4 of the Federal Arbitration Act, 9 U.S.C. §§2, 3 and 4. They are reprinted as Appendix C and Appendix D, respectively.

STATEMENT OF THE CASE

This petition for a writ of certiorari arises from the decision by the United States Court of Appeals for the Eighth Circuit to affirm the judgment of the United States District Court for the Western District of Missouri, Western Division, denying Petitioner's motion for an injunction enjoining arbitration between Petitioner and Respondent. The jurisdiction of the United States District Court in this case was predicated upon both

diversity of citizenship, 28 U.S.C. §1332, and federal question jurisdiction, 28 U.S.C. §1331.

The dispute between the parties arose out of Petitioner S&M Constructors, Inc.'s (hereinafter "Petitioner") subcontract with Respondent The Foley Company (hereinafter "Respondent") for excavation and other heavy underground construction services rendered at the United States Army Corps of Engineers' ("Corps of Engineers") project designated as the Power Reliability Enhancement Program (AJCC) (the "Project"), Fort Ritchie, Maryland. Respondent is the general contractor for the Project under the prime contract with the Corps of Engineers. Respondent contracted with the United States Government through its executive agency, the Corps of Engineers, for all construction aspects of the Project.

During the course of its work on the Project, Petitioner properly requested periodic payments under the S&M-Foley subcontract, several of which payments were refused by Respondent. To seek redress for this refusal of payment, a dispute only between Petitioner and Respondent, Petitioner made a demand for arbitration under the arbitration clause of the S&M-Foley subcontract. The subcontract provides in Attachment 5, Schedule D, paragraph 2:

> 2. Arbitration and Enforcement Cost. It is agreed that disputes arising under this Agreement, or under any instrument made to carry out the terms of this Agreement, shall, where permitted by law, be submitted to arbitration in accordance with the then obtaining rules of the American Arbitration Association. Any hearing shall be held in Kansas City, Missouri. Any costs including without limitation, legal fees incurred by either party in the successful enforcement of any rights hereunder, shall be borne by the party against which said rights are enforced.

Attachment 5, Schedule D is reprinted as Appendix E.

At this time, it was appropriate to file under the arbitration clause because only one issue, the timely payment of progress estimates, was pending, and this issue involved Petitioner and Respondent only. However, after the arbitration demand was filed, Respondent initiated a claim for delay which involved claims against the United States. Because it was inappropriate to proceed with an arbitration when there were issues pending which involved the Government, a non-party to the arbitration, Respondent, on December 6, 1990, filed an Application to Stay Arbitration in the Circuit Court of Jackson County, Missouri at Kansas City. Application to Stay Arbitration reprinted as Appendix F. Respondent expressly relied on the language of the subcontract which incorporated by reference the terms and conditions of the prime contract between Respondent and the Corps of Engineers. Specifically, Attachment 5, Schedule D, paragraph 1 provided:

> 1. Incorporation Provision. All the various contract documents between the Owner and The Foley Co. are incorporated by reference as if fully rewritten herein and shall be binding upon and provide entitlement to, *mutatis mutandis*, The Foley Co. and subcontractor.

Petitioner was in agreement with Respondent that the arbitration should be stayed since the Government, as cause of the delay, was inextricably linked to this cause of action.

Respondent argued in its Application to Stay that the prime contract contained a Disputes clause which states that "this contract is subject to the Contract Disputes Act of 1978, (41 U.S.C. §601-613)." The Disputes clause is reprinted as Appendix G. Respondent asserted that this provision requires that "*all* disputes

arising under *or relating* to this contract shall be resolved under this clause" [Emphasis added].

Further, Respondent maintained in its Application to Stay the arbitration that

> [t]his Disputes clause requires that any claims shall be first submitted to the United States Army Corps of Engineers Contracting Officer for a written decision, and that his decision shall be final unless the contractor appeals or files suit as provided in the Contract Disputes Act (41 U.S.C. §601-613).

Respondent argued that the arbitration was not yet ripe since Petitioner sought to

> arbitrate disputes which either (a) have not been submitted to the Contracting Officer for a decision as required by the Disputes clause, or (b) have been submitted to the Contracting Officer for a decision but no such decision has been rendered by the Contracting Officer. *Thus, [Respondent contended] S&M's claims in its Demand for Arbitration are null and void as they are in violation of the express language of the Disputes clause in Foley's contract with the United States Government....* [Emphasis supplied]

Since Petitioner agreed with Respondent that the arbitration should be stayed because of the Government's causal involvement, Petitioner acceded to the logic of Respondent's position and did not seek to compel arbitration at that time. Petitioner agreed with Respondent that the Disputes clause and the procedures flowing therefrom represented the chosen forum for all claims involving Petitioner, Respondent and the Government. Moreover, Petitioner and Respondent were in agreement that the controversy was not yet ripe since the administrative relief provided for by the Disputes clause as incorporated into the S&M-Foley subcontract had not been exhausted.

Subsequently, in accordance with the Disputes clause of the prime contract between Respondent and the Corps of Engineers, and in accordance with the Contract Disputes Act of 1978, Petitioner, through Respondent's sponsorship, submitted claims to the Corps of Engineers Contracting Officer for equitable adjustment for compensable delays resulting from the failure of the United States Government to grant security clearances for Petitioner's personnel in a timely manner and for other Government acts or omissions. Respondent has additional claims properly sounding against the Government which aggregate in excess of two million dollars ($2,000,000.00). Thus, Petitioner's and Respondent's claims ought both to be before the Contracting Officer for his final determination. Petitioner's claims have been so submitted, but have not as yet been decided. Respondent, however, has reversed its earlier position and chosen not to submit its claims against the Government, but seeks to arbitrate them against Petitioner.

Petitioner's demands against Respondent in the arbitration proceeding are precisely the same claims for equitable adjustment that Petitioner has submitted to the Contracting Officer against the United States Government. Respondent, instead of properly filing its claims against the Government, has turned 180 degrees on its former position and has filed a counterclaim in the arbitration against Petitioner seeking $2,359,849.22 for losses caused by Petitioner's alleged delays and for alleged substandard performance by Petitioner under the S&M-Foley subcontract. Respondent's counterclaim is based primarily on the premise that Petitioner is the cause of the obstruction of Respondent's scheduling and, therefore, prevented Respondent's completion of the Project in a timely manner. The fact is, however, that nearly all of the delays upon which Respondent's counterclaim are based are, insofar as Petitioner is

involved, exactly those delays that are the basis of Petitioner's claim submitted to the Corps of Engineers' Contracting Officer for equitable adjustment in time and monies and, thus, result from commissions or omissions of the United States Government.

Approximately one year after it applied to *stay arbitration* proceedings, Respondent is now seeking to *compel arbitration*. Petitioner filed its initial Application to Stay Arbitration on January 23, 1992 before the Circuit Court of Jackson County, Missouri at Kansas City, which Application was denied on state law grounds. Petitioner, on February 14, 1992, then sought a Preliminary Injunction before the United States District Court for the Western District of Missouri, Western Division based on federal grounds which motion was denied and from which Order Petitioner appealed. On appeal, the United States Court of Appeals for the Eighth Circuit by a decision dated March 16, 1992 affirmed the judgment of the United States District Court, which judgment is now the subject of Petitioner's petition for a writ of certiorari.

ARGUMENT

The Court is presented with the issue of determining the priority of the application of two conflicting federal statutes in the context of the complex and unique rules governing contracts between executive agencies of the United States and third parties for the procurement of services, personal property or the construction, alteration or repair of real property. Specifically, the issue is whether arbitration between a prime contractor and its subcontractor under a government contract may be compelled under the Federal Arbitration Act, 9 U.S.C. §§2, 3 and 4, where the matters in question involve claims against the Government as-

serted under the Disputes clause of the prime contract and the Contract Disputes Act of 1978, 41 U.S.C. §§602, 605 and 606, incorporated therein.

It is imperative that this Court resolve this unique conflict of priority between federal statutes, each with its own rationale for enforcement. The context of government contracting warrants a close examination and the resolution of the priority as between the procedures of the Contract Disputes Act of 1978 and the enforcement mandates of the Federal Arbitration Act so that parties involved in the government contract process will be aware of their procedural remedies when claims are asserted against the Government. By failing to acknowledge the priority of the procedures dictated by the Contract Disputes Act, the Court will endorse the emasculation of the dispute resolution remedies of that Act.

In the case at bar, Petitioner initiated arbitration proceedings solely to obtain payment from Respondent under its subcontract. This action was opposed and the arbitration was placed in abeyance by the parties' mutual consent. Subsequently, Petitioner initiated a claim against the United States under the Disputes clause of the prime contract as incorporated by reference into Petitioner's subcontract. This claim was properly made pursuant to the procedures dictated by the Contract Disputes Act of 1978, which requires that claims by a contractor against the Government be submitted in writing to the contracting officer for a decision. 41 U.S.C. §605. To effect Petitioner's claim, Respondent, as prime contractor, was required to pass on this claim pursuant to the sponsorship rules previously established under government contract law since Petitioner was a subcontractor and therefore not in privity of contract with, and had no standing to pursue directly its grievances against, the Government. As noted, Petitioner's

claim primarily centered on Government caused delays involving the untimely issuance of security clearances to Petitioner's personnel. These delays are at the heart of the conflict between Petitioner and Respondent since they represent Petitioner's defense against Respondent's claim for delays in addition to being, in their own right, a compensable claim against the Government.

In spite of the fact that Petitioner had initiated the contractually mandated dispute resolution process, based on the Contract Disputes Act of 1978 and called for under the prime contract and incorporated by reference into the subcontract, Respondent unilaterally resuscitated the previously mutually agreed to stay of the arbitration proceeding, asserting claims that were substantially identical with the claims made by Petitioner against the Government. By virtue of the arbitration clause of the subcontract and the absence of privity between Petitioner and the Government, the Government could not and cannot be a party to the proposed arbitration proceeding. Consequently, Petitioner sought injunctive relief from the premature arbitration pending the exhaustion of the procedures dictated by the Contract Disputes Act of 1978.

The United States Court of Appeals for the Eighth Circuit affirmed the decision of the United States District Court for the Western District of Missouri, Western Division, denying a stay of the arbitration proceeding. The Court, in reaching its decision, relied on recent Supreme Court cases that enforced arbitration through the application of the Federal Arbitration Act and specifically cited *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983) and *Dean Witter*

Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985). These cases stand for the proposition that under the Federal Arbitration Act arbitration is a favored remedy that mandates the enforcement of agreements to arbitrate statutory claims. What the Court of Appeals failed to address is the factual distinction between the instant case and the above cited cases, namely, that this case falls within the unique context of government contracting and involves claims against the government as part of its core proceeding.

It is correct that the subcontract between Petitioner and Respondent contained an arbitration clause. Such contract, by reason of the specific incorporation of the terms of the prime contract, also includes the Disputes clause requiring that "*all disputes* arising under or *relating to* this contract *shall be* resolved under this clause [emphasis added]." This language is, by design, broad and inclusive, and therefore, of sufficient breadth to incorporate all claims and disputes involving the government, its prime contractor and a subcontractor asserting claims against the Government. The Disputes clause further expressly states that "this contract is subject to the Contract Disputes Act of 1978, (41 U.S.C. §§601-613)."

In the instant case, the Government is an essential party to the resolution of the key issues in dispute. Petitioner's claims against the Government are identical to its defenses against Respondent's claims in arbitration. The delays for which Respondent seeks compensation from Petitioner are delays that were in fact caused by the Government's failure to provide security clearance for Petitioner's personnel in a timely manner. As a consequence, the United States is a necessary party to any resolution of the question whether Petitioner's delays were either compensable or excusable. By following

the disputes resolution mechanism of the Disputes clause and the Contract Disputes Act, Respondent and Petitioner will ensure, consistent with the dictates of justice, the participation of the Government in resolving matters that affect all three parties.

In reviewing the above cited authority applying the Federal Arbitration Act to various statutory remedies, the Court of Appeals failed to discern that the instant case does not involve the applicability of arbitration to enforce a statutory remedy running only between the parties to the arbitration, but rather involves a statutory procedure designed to resolve claims involving and against the Government, which procedure must be controlling in the context of government contract disputes. To compel arbitration of all issues between Petitioner and Respondent in a forum in which the principal necessary party, i.e., the Government, is unavailable and "uncompellable" flies in the face of the statutory prescription of the Contract Disputes Act of 1978 to resolve *all claims relating to* or involving the Government.

This Court has hitherto, in appropriate circumstances, declined to enforce a contract arbitration clause. *Wilko v. Swan*, 346 U.S. 427 (1953) The Court, in *Wilko v. Swan*, refused to enforce arbitration because of the statutory language and scheme of the Securities Act of 1933. Similarly, the Court should find that the disputes resolution procedures of the Contract Disputes Act are, in the instant case, controlling to resolve disputes arising within the government contract context and relating to claims asserted against and involving the Government.

In *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985), this Court reviewed the enforcement of arbitration by the Appellate Courts and noted that pendant arbitrable claims are subject to arbitration even at the

expense of judicial economy. It is Petitioner's position, however, that the instant case does not involve pendant arbitrable claims because of the claims asserted by Petitioner against and involving the Government. The statutory rationale of the Contract Disputes Act is to prescribe the procedural mechanism for *claims involving the Government*. This rationale, of necessity, renders claims against and involving the Government non-arbitrable between the prime contractor and its subcontractor only. Applying the Court's reasoning in *Dean Witter Reynolds, Inc. v. Byrd, supra*, and *Wilko v. Swan, supra*, Petitioner and Respondent should be required to exhaust the procedures dictated by the Contract Disputes Act as regards claims among themselves and the Government prior to proceeding to the arbitration of the remaining claims, if any, sounding solely between themselves.

The United States District Court for the Northern District of California in *Grinnell Fire Protection Systems Co., Inc. v. Regents of University of California*, 554 F. Supp. 495 (N.D. Cal., 1982) was confronted with a case quite similar to the instant proceeding. In *Grinnell*, a fire sprinkler subcontractor to the University of California, working pursuant to a subcontract *related to* a prime contract between the University of California and the United States Government, filed suit against the University of California ("University") for amounts alleged to be owing under its subcontract. The University moved to stay the action filed by its subcontractor on the ground that Grinnell had not yet complied with the disputes resolution clause contained in the contract. This disputes clause was the standard clause — as is the clause in the instant case — found in Government contracts which provides for resolution of disputes in accordance with the Contract Disputes Act of 1978. In reaching its decision, the court held that the dispute was

governed by federal law and that the subcontractor was not entitled to pursue other avenues without first exhausting the administrative relief provided by the disputes clause of the contract in accordance with the Contract Disputes Act of 1978. The court noted that federal law was controlling in a case such as this citing *American Pipe & Steel Corp. v. Firestone Tire & Rubber Co.*, 292 F.2d 640, 644 (9th Cir. 1961) which focused on the importance of having uniform federal policy when national security and the administration of national security contracts is involved. Similarly, the Court cited with approval *United States v. Taylor*, 333 F.2d 633 (5th Cir. 1964) which held federal law controlling on the ground that the Government has an interest in the expeditious resolution of disputes involving Government contracts.

In the instant case, Petitioner is seeking the application of federal law governing the resolution of government contract disputes and the proper exhaustion of those administrative remedies provided for under the Disputes clause. It is Petitioner's position that the Court's holding in *Grinnell* is persuasive here. Both instances involve government contracts covering high security facilities with extensive government supervision of the project. Both instances warrant the application of consistent federal law compelling the resolution of matters in which the Government is a proper and necessary party and which are under consideration by the Contracting Officer before following the more limited arbitral avenue of resolution of matters in dispute between Petitioner and Respondent only. Petitioner and Respondent have not yet exhausted the administrative remedies that they initially elected to pursue under the Disputes clause and the Contract Disputes Act and again confirmed when they mutually agreed to stay the arbitration proceeding pending disposition pursuant to

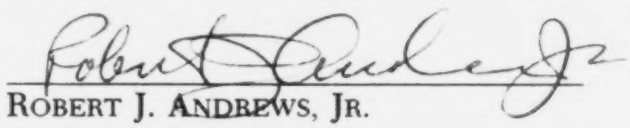
the prime contract's Disputes clause and the Contract Disputes Act of 1978. It is logical and consistent with the dictates of the Contract Disputes Act that Petitioner and Respondent must, as Respondent itself originally argued, exhaust these administrative remedies and complete the disputes resolution process they have selected and hold the arbitration in abeyance pending resolution of claims involving the Government, which claims have already been submitted pursuant to the disputes resolution procedures of the Contract Disputes Act of 1978 and the Disputes clause incorporated in the Foley-S&M subcontract.

Further, it is critical to note that Petitioner does *not* seek to enjoin arbitration permanently, but rather seeks appropriately to delay arbitration as unripe until the disputes involving Petitioner, Respondent *and the Government*, which disputes subsume and underlie almost all the disputes between Petitioner and Respondent, can be determined. Any disputes remaining, involving only Petitioner and Respondent may then be arbitrated.

Cases such as *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, *supra*, *Dean Witter Reynolds, Inc. v. Byrd*, *supra*, *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, *supra*, and *Shearson/American Express, Inc. v. McMahon*, should not be used as a blanket rationalization for enforcing arbitration in the unique context of claims against the Government pursuant to the government contract process where Congress has already enacted a uniform statutory scheme for resolving such disputes under the Contract Disputes Act of 1978. Within this context there is a grave need for this Court to resolve the priority of the Contract Disputes Act vis-à-vis the enforcement of arbitration pursuant to the Federal Arbitration Act.

In summary and for the reasons set forth above, this Court should exercise its authority and grant this petition to clarify this unique conflict of federal statutes in the area of government contract law.

Respectfully submitted,



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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-1423

S&M CONSTRUCTORS, INC.
Plaintiff-Appellant,

v.

THE FOLEY COMPANY
Defendant-Appellee.

APPEAL from the United States District Court for the Western District of Missouri.

[PUBLISHED]

Submitted: March 11, 1992

Filed: March 16, 1992

Before: JOHN R. GIBSON, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and LOKEN, Circuit Judge.

PER CURIAM.

S&M Constructors, Inc., appeals from an order of the district court denying its motion for a preliminary injunction to halt arbitration proceedings which were scheduled to commence February 25, 1992. S&M has presented a motion for stay pending appeal. We set the motion for oral argument and stayed commencement of arbitration until the motion could be heard. We now deny the motion for stay.

S&M was a subcontractor of Foley Company, which had contracted with the Corps of Engineers to construct defense related facilities requiring security clearances. The project has been completed. The contract between S&M and Foley contained an arbitration clause. Foley's contract with the Corps provided that the contractor would submit claims to the government under the Contract Disputes Act. 41 U.S.C. §601-613. The contract terms were incorporated in the S&M subcontract. S&M filed a notice of arbitration, and Foley asserted counterclaims against S&M. Foley, at S&M's request, has filed claims with the contracting officer under the Contract Disputes Act. Foley filed an application to stay arbitration in the Circuit Court of Jackson County, Missouri in the fall of 1991, but this action was evidently dismissed by agreement of the parties. The arbitration was scheduled to commence in February, 1992. On January 23, 1992, S&M filed a petition for a temporary restraining order in the Circuit Court of Jackson County, Missouri. A temporary restraining order was entered but was dissolved by that court in an order dated February 10, 1992. The arbitration was then scheduled for February 25, 1992.

On February 14, S&M filed this motion for temporary restraining order in the United States District Court, and a hearing was held in which the district court considered the case as a motion for preliminary injunction against the arbitration proceedings. The district court applied only one of the factors under *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981), whether S&M had demonstrated the strong likelihood of success on the merits. The district court determined that the Contracts Disputes Act does not require that the arbitration be stayed; that S&M had failed to demonstrate that the contracting parties had intended, through the incorporation clause, to require that the

Contracts Disputes Act procedures take precedence over arbitration; and that the arbitrators may of course consider the practicalities springing from the arbitration going forward in the face of claims that were asserted under the Contracts Disputes Act. The preliminary injunction was denied.

In deciding S&M's motion for stay pending appeal, we consider the four factors that are employed by the district court in considering preliminary injunctive relief, of which we believe likelihood of success on the merits is most significant. *James River Flood Control Association v. Watt*, 680 F.2d 543, 544; *Hilton v. Braunskill*, 481 U.S. 770 (1987). S&M relies principally on two district court decisions in arguing that the administrative procedures of the Contract Disputes Act take precedence over arbitration. *Grinnell Fire Protection Systems, Inc. v. Regents of the University of California*, 554 F.Supp. 495 (D.C., N.D. Ca. 1982) stayed consideration of a diversity action asserting contract disputes so that a contractual dispute resolution procedure before the Department of Energy's Contracting Officer could be utilized. The contract in question was a national security related energy research and development program. As this involves the staying of diversity litigation before the court, we do not believe that *Grinnell* supports S&M's position. S&M also relies on *Bache Halsey Stuart, Inc. v. French*, 425 F.Supp. 1231 (D.C., D.C. 1977) in which the court held that arbitration proceedings should be stayed to allow administration adjudication of the claims by the Commodity Futures Trading Commission pursuant to procedures established under section 14 of the Commodity Exchange Act, 7 U.S.C. section 18. Judge Sirica relied primarily on *Wilko v. Swan*, 346 U.S. 427 (1953) in concluding that there were some exceptions to the Arbitration Act.

Since *Grinnell* and *French* were decided, the Supreme Court in a number of cases has enforced arbitration in securities and RICO disputes, and of antitrust claims, *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, 475 U.S. 614 (1985); *Shearson/American Express, Inc. v McMahon*, 482 U.S. 220, 225-238 (1987). While S&M argues that it will be irreparably harmed by bifurcated proceedings, the Supreme Court has held that arbitration must go forward even under such circumstances. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 461 U.S. 1, 20 (1983), and *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

The cases relied upon by S&M have little persuasive weight in light of these later decisions of the Supreme Court underscoring the enforceability of arbitration agreements. Although we agree with S&M that the court has jurisdiction to decide whether the contracting parties intended the Contract Disputes Act procedures to precede arbitration, *see Gelco Corp. v. Baker Ind., Inc.*, 779 F.2d 26, 28 (8th Cir. 1985), S&M has failed to demonstrate the likelihood that it will succeed on the merits of this contract claim. Accordingly, we must deny the motion for a stay pending appeal.

We share the views expressed by the district court that the arbitration panel should take into consideration the proceedings under the Contract Disputes Act and tailor relief accordingly. Indeed, we note that counsel for Foley conceded at oral argument that the arbitrators should stay S&M's claim in arbitration to the extent that claim has also been submitted to the government con-

tracting officer under the Contracts Disputes Act procedures.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Appendix B

In the
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

S&M CONSTRUCTORS, INC.,
Plaintiff,

v.

THE FOLEY COMPANY,
Defendant.

No. 92-0142-CV-W-6

MEMORANDUM AND ORDER

Pending before the court is plaintiff's motion for a preliminary injunction against arbitration proceedings scheduled to commence next week. Plaintiff is a subcontractor with defendant government contractor. The contractor, Foley, is prepared to present pending disputes between the parties to arbitration, pursuant to the arbitration clause of the subcontract (§2, Attachment 5, Schedule D, "additional provisions"). The subcontractor, S&M, contends there should be no arbitration proceedings until resolution of the disputes (or at least related disputes) under the Contract Disputes Act, 41 U.S.C. §§601-613, and provisions in the prime contract relating to dispute resolution. All contract documents between Foley and the Government are incorporated in the subcontract by reference and "shall be binding upon and provide entitlement to, *mutatis mutandis*, the Foley Co. and Subcontractor" (§1, Attachment 5, Schedule D, "additional provisions").

A preliminary injunction hearing was held yesterday. The essential factors appear to be undisputed. Neither party offered more than argument of counsel. Certain peripheral factual matters, referred to by counsel, may well be in conflict. The court does not purport to have a full understanding of the background of the case after an argument of an hour and a half, covering much material not of record in this case. Enough is known, however, to permit a ruling in which the court has some confidence.

Normally the court would analyze the *Dataphase* factors, as set forth by the Eighth Circuit Court of Appeals. *Dataphase Systems, Inc. v. CL Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981). In this case, however, likelihood of success is deemed controlling. Plaintiff will obtain judicial relief now or never, given the arbitration schedule.

On its face, the arbitration clause appears to have been properly invoked by Foley. S&M contends, however, that there are two conflict resolution procedures available, and that preference should be given to certain proceedings already begun under the Contract Disputes Act. Standard arbitration is said to be precluded by the language of the arbitration clause which confines it to proceedings "permitted by law." Since the general contract requires that "all disputes arising under or relating to this contract shall be resolved under this clause," it is suggested that the mandatory method of dispute resolution is therein specified and supersedes the general arbitration clause.

The court is unable, however, to find that standard arbitration is in any sense prohibited "by law." The exception to arbitration seems to refer to limitations on arbitration created by statute or judicial rulings (generally tied to constitutional concepts such as sovereign

immunity). In this instance, I find nothing in the Contract Disputes Act that precludes ordinary arbitration of disputes between government contractors and their subcontractors.[1] The related statutory language distinctly refers to contractor disputes with the Government. 41 U.S.C. §605(a). While it has been construed to affect disputes between subcontractors and the Government, the present arbitration does not, as described, directly affect the Government (which appears to be one of S&M's concerns, when asserting the possibility of different results). *Compare Carroll v. U.S. Postal Service*, 764 F.Supp. 143 (E.D. Mo. 1991); *Eastern, Inc. v. Shelly's of Delaware, Inc.*, 721 F.Supp. 649 (D. N.J. 1989); *Riley Electric Co. v. American District Telegraph Co.*, 715 F.Supp. 813 (W.D. Ky. 1989).

The arbitration clause upon which Foley relies therefore appears to have been soundly invoked.

In the alternative, even if there is some ambiguity in the two paragraphs of Attachment 5, or some potential conflict that needs resolution, the controlling case law leaves such resolution to the arbitrators rather than the court. If Foley had sought an order *compelling* arbitration, the court would be required to grant it, " 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' " *Gelco Corp. v. Baker Industries, Inc.*, 779 F.2d 26, 28 (8th Cir. 1985). If the arbitration clause can reasonably be construed to cover the dispute, arbitration must be compelled. *Id.*

In the instant case, it can easily be argued that the arbitration clause specified by the parties was intended to have comprehensive effect, and that the incorpora-

[1] Plaintiff's claim that arbitration presents awkward problems does not suffice, in my judgment, to make it legally impermissible.

tion of the provisions of the contract between Foley and the Government was unaffected by the extraneous provision showing how disputes between Foley and the Government should be resolved. Thus I can find no basis for an order stopping arbitration.

This ruling does not, of course, attempt to provide guidance to the arbitrators. By their independent reading of the contract language, with the business sophistication and care anticipated from arbitrators, they may conclude that S&M is entitled to a complete or partial stay of arbitration. Presumably they may also consider the practicalities urged upon me by S&M. The judicial approach to arbitration is somewhat less influenced by the practicalities; for example, a court must compel arbitration of arbitrable claims even if this would result in the maintenance of separate proceedings in different forums. *Nesslage v. York Securities, Inc.*, 823 F.2d 231 (8th Cir. 1987).

Consideration has been given to the district court rulings cited by plaintiff, but I do not find them dispositive. For the reasons stated, the motion for preliminary injunction is hereby DENIED.

HOWARD F. SACHS, CHIEF
JUDGE
UNITED STATES DISTRICT COURT

Dated: February 21, 1992

Appendix C

CONTRACT DISPUTES ACT OF 1978, 41 U.S.C.

§602. Applicability of law

(a) Executive agency contracts

Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of Title 28) entered into by an executive agency for —

(1) the procurement of property, other than real property in being;

(2) the procurement of services;

(3) the procurement of construction, alteration, repair or maintenance of real property; or,

(4) the disposal of personal property.

§605. Decision by contracting officer

(a) Contractor claims

All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. All claims by the government against a contractor relating to a contract shall be the subject of a decision by the contracting officer. The contracting officer shall issue his decisions in writing, and shall mail or otherwise furnish a copy of the decision to the contractor. The decision shall state the reasons for the decision reached, and shall inform the contractor of his rights as provided in this chapter. Specific findings of fact are not required, but, if made, shall not be binding in any subsequent proceeding. The authority of this subsection shall not

.extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine. This section shall not authorize any agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

(b) Review; performance of contract pending appeal

The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter. Nothing in this chapter shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

(c) Amount of claim; certification; notification; time of issuance; presumption

(1) A contracting officer shall issue a decision on any submitted claim of $50,000 or less within sixty days from his receipt of a written request from the contractor that a decision be rendered within that period. For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable.

(2) A contracting officer shall, within sixty days of receipt of a submitted certified claim over $50,000 —

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued

(3) The decision of a contracting officer on submitted claims shall be issued within a reasonable time, in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor.

(4) A contractor may request the agency board of contract appeals to direct a contracting officer to issue a decision in a specified period of time, as determined by the board, in the event of undue delay on the part of the contracting officer.

(5) Any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim as otherwise provided in this chapter. However, in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer, the tribunal concerned may, at its option, stay the proceedings to obtain a decision on the claim by the contracting officer.

§606. Contractor's right of appeal to board of contract appeals

Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title.

Appendix D

TITLE 9
ARBITRATION

§2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to

compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or of the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of arbitration, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in

writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Appendix E

ATTACHMENT 5

SCHEDULE D
ADDITIONAL PROVISIONS
TO SUBCONTRACT NO. 2360-01-01-02310

1. Incorporation Provision — All the various contract documents between the Owner and The Foley Co. are incorporated by reference as if fully rewritten herein and shall be binding upon and provide entitlement to, *mutatis mutandis*, The Foley Co. and Subcontractor.

2. Arbitration and Enforcement Costs — It is agreed that disputes arising under this Agreement, or under any instrument made to carry out the terms of this Agreement, shall, where permitted by law, be submitted to arbitration in accordance with the then obtaining rules of the American Arbitration Association. Any hearing shall be held in Kansas City, MO. Any costs including, without limitation, legal fees incurred by either party in the successful enforcement of any rights hereunder, shall be borne by the party against which said rights are enforced.

FOLEY COMPANY	S & M CONSTRUCTORS, INC.
By _____	By _____
Kenneth A. Kure	Victor J. Scaravilli
TITLE *Vice President*	TITLE *President, CEO*

Appendix F

In the CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS, CITY

THE FOLEY COMPANY, A Missouri Corporation, *Plaintiff*, vs. S & M CONSTRUCTORS, INC. (Serve: Theodore A. Gullia, Jr. Registered Agent 850 Halle Building Cleveland, Ohio 44115) *Defendant.*	Case No. CV 90-32241 CIVIL B

PLAINTIFF'S APPLICATION TO STAY ARBITRATION

COMES NOW the Foley Company (herein "Foley") pursuant to R.S.Mo. §435.355 and applies to this Court for a stay of the arbitration proceedings commenced by defendant S & M Constructors, Inc. (herein "S & M"). In support of this Application, Foley states:

1. Foley is a Missouri corporation in good standing, with its offices at 7501 Front Street, Kansas City, Missouri 64120.

2. S & M is an Ohio corporation in good standing, with its offices at 29100 Hall Street, Solon, Ohio 44139. S & M may be served through its registered

agent,Theodore A. Gullia, Jr., 850 Halle Building, Cleveland, Ohio 44115.

3. On or about October 24, 1990, S & M, through its attorneys, filed a Demand for Arbitration with the American Arbitration Association, demanding that Foley arbitrate disputes arising under S & M's subcontract with Foley for a project for the United States Army Corps of Engineers known as the Power Reliability Enhancement Program (AJCC), Fort Ritchie, Maryland (herein "the Project"). The Demand for Arbitration was transferred to Kansas City from Washington, D.C. upon Foley's notification to the American Arbitration Association that the subcontract between S & M and Foley, required any arbitration to be held in Kansas City, Missouri. (A true and correct copy of the Demand for Arbitration is attached as Exhibit 1. A true and correct copy of S & M's subcontract with Foley is attached as Exhibit 2).

4. The American Arbitration Association has requested that the parties choose arbitrators and that Foley file its Answer and any counterclaim by December 6, 1990. (A true and correct copy of correspondence from the American Arbitration Association to this effect is attached as Exhibit 3).

5. S & M agreed in its subcontract with Foley, Attachment 5, Schedule D, paragraph 1 of the Additional Provisions, that "all various contract documents between the Owner and The Foley Co. are incorporated by reference as if fully rewritten herein and shall be binding upon and provide entitlement to, *mutatis mutandis*, The Foley Co. and Subcontractor." (Exhibit 2).

6. Foley's contract documents with the Owner, the United States Army Corps of Engineers, contains a Disputes clause which requires that all disputes arising

under or relating to the contract shall be resolved under that clause. A true and correct copy of this Disputes clause is attached as Exhibit 4. This Disputes clause requires that any claims shall be first submitted to the United States Army Corps of Engineers Contracting Officer for a written decision, and that his decision shall be final unless the contractor appeals or files a suit as provided in the Contracts Disputes Act (41 U.S.C. §601-613).

7. Foley's contract documents with the Owner, the United States Army Corps of Engineers, contains a Changes clause which requires that the contractor must assert its right to an increase in the contractor's cost of, or the time required for, the performance of any part of the work under the contract within thirty (30) days after receipt of a written change order or the furnishing of a written notice from the Corps of Engineers. The contractor must submit to the Corps of Engineers' Contracting Officer a written statement describing the general nature and amount of the contractor's proposal. A true and correct copy of this Changes clause is attached as Exhibit 5.

8. By virtue of the clause in S & M's subcontract with the Foley Company which incorporates all of the provisions of Foley's contract documents with the Owner, as set forth above, this Disputes clause and Changes clause are part of S & M's subcontract with Foley and are binding upon S & M.

9. In its Demand for Arbitration, S & M seeks to arbitrate disputes which either (a) have not been submitted to the Contracting Officer for a decision as required by the Disputes clause, or (b) have been submitted to the Contracting Officer for a decision but no such decision has yet been rendered by the Contracting Officer. Thus, S & M's claims in its Demand for

Arbitration are null and void as they are in violation of the express language of the Disputes clause in Foley's contract with the United States Government, which is incorporated into S & M's subcontract as described above.

10. In addition, in its Demand for Arbitration, S & M seeks to arbitrate disputes which must be handled through the process required by the Changes clause, but said disputes either (a) have not been submitted to the Contracting Officer to seek an adjustment increasing the time and cost as required by the Changes clause, or (b) have been submitted to the Contracting Officer for a decision under the Changes clause but no such decision has yet been rendered by the Contracting Officer. Thus, S & M's claims in its Demand for Arbitration are null and void as they are in violation of the express language of the Changes clause in Foley's contract with the United States Army Corps of Enginers, [sic] which is incorporated into S & M's subcontract as described above.

11. In addition, Foley has been damaged by S & M's actions on the Project and intends to file a claim or counterclaim against S & M. However, many of the damages which Foley will assert against S & M are not yet known to Foley as the full impact of S & M's actions on Foley cannot be determined until the end of the construction Project, and until the Contracting Officer has issued all of his decisions. This is a large, multimillion dollar, complex Government construction project with very tight scheduling, and S & M's delays and failure to perform its work have had adverse effects on Foley in an amount in excess of $2,000,000.00. All of Foley's damages against S & M cannot be determined as of this date and will not be capable of ascertainment until the end of the Project, and until the Contracting

Officer has issued all of his decisions. Foley expects that its damages against S & M may exceed $15,000,000. Any decision rendered by arbitrators at this point would necessarily be incomplete and could not constitute a final decision regarding the disputes between Foley and S & M. Thus, this matter is not yet ripe for determination.

12. R.S. Mo. §435.355 (2) provides that "on application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate." The only agreement to arbitrate between the parties arises out of S & M's subcontract with Foley, which also contains the incorporated requirement that S & M first proceed with its claims under the procedure required by the Disputes and Changes clauses of Foley's contract with the Owner, as set forth above. As S & M failed to comply with the requirements of the Disputes and Changes Clause, S & M is in violation of the contract which contains the arbitration clause upon which S & M relies. There is therefore no agreement to arbitrate as the arbitration clause cannot be applicable until S & M exhausts its remedies required by the Disputes and Changes clauses as set forth above.

13. Foley requests that this Court should set this matter for an evidentiary hearing as R.S. Mo. §435.355(2) states that "such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration."

WHEREFORE, plaintiff the Foley Company prays that this Court may grant plaintiff's Application to Stay Arbitration and that this Court may enter its Order staying the arbitration demanded by defendant S & M Con-

structors, Inc. and that this Court may set this matter for an evidentiary hearing, and for all costs, and for any other relief which this Court may deem appropriate.

NIEWALD, WALDECK & BROWN
A Professional Corporation
2500 Commerce Tower
911 Main Street
Kansas City, Missouri 64105
(816) 471-7000

Kevin E. Glynn #21935
William J. DeBauche #32674
ATTORNEYS FOR
PLAINTIFF
THE FOLEY COMPANY

I hereby certify that a true and correct copy of the above and foregoing was mailed this 6th day of December, 1990 to:

ROBERT J. ANDREWS, JR.
Andrews & Ryan
21900 [sic] Hall Street
Solon, Ohio 44139
Attorneys for Defendant
S & M Constructors, Inc.

Attorneys for Plaintiff
The Foley Company

Appendix G

DISPUTES CLAUSE OF PRIME CONTRACT

I. 48 DISPUTES (1984 APR) FAR 52.233-1

(a) This contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. 601-613) (the Act).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.

(c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding $50,000 is not a claim under the Act until certified as required by subparagraph (d)(2) below. A voucher, invoice, or other routine request for payment that is not in dispute when converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(d) (1) A claim by the Contractor shall be made in writing and submitted to the Contracting Officer for a written decision. A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.

(2) For Contractor claims exceeding $50,000, the Contractor shall submit with the claim a certification that —

(i) The claim is made in good faith;

(ii) Supporting data are accurate and complete to the best of the Contractor's knowledge and belief; and

(iii) The amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable.

(3) (i) If the Contractor is an individual, the certification shall be executed by that individual.

(ii) If the Contractor is not an individual, the certification shall be executed by —

(A) A senior company official in charge at the Contractor's plant or location involved; or

(B) An officer or general partner of the Contractor having overall responsibility for the conduct of Contractor's affairs.

(e) For Contractor claims of $50,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-certified claims over $50,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.

(f) The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in the Act.

(g) The Government shall pay interest on the amount found due and unpaid from (1) the date the Contracting Officer receives the claim (properly certi-

fied if required), or (2) the date payment otherwise would be due, if that date is later, until the date of payment. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim.

(h) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.